Rule 15, Ariz. R. Crim. P.

RESPONSE TO "DEFENDANT'S OBJECTION TO STATE'S CONSUMPTION OF SWABS/SAMPLE FOR DNA ANALYSIS"

> *Brady*, *Trombetta*, and *Youngblood*: The defendant is not denied due process and there is no *Brady* violation when the amount of biological material obtained in an investigation is so small that the State's testing will consume the entire sample. The defendant is not entitled to have his expert present during the State's testing process; it is sufficient that the defendant has a full opportunity to cross-examine the expert and attack any perceived flaws in the testing procedure.

The defense objects to the State's performing DNA tests on certain swabs obtained during the investigation of the defendant's case because the DNA testing procedure will consume all evidentiary material that may be present on the swabs. The State responds that testing the swabs will not violate the defendant's rights, for reasons stated in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual and Procedural Background

[State what the defendant is accused of doing and what charge(s) are pending against him.]

The State has given this Court and the defense written notice that on [date], the scientific laboratory of the Arizona Department of Public Safety [DPS] intends to perform DNA testing [and/or other scientific testing] on sample swabs obtained from [the victim/the defendant/the crime scene, or other source]. The State wants to test these swabs because the swabs may contain DNA or other biological material that may be of evidentiary value in the defendant's case. The State has also given notice that the testing process will entirely consume any biological material that may be present on the swabs. The defense has objected to the State's consuming the material for testing

purposes, claiming that consuming the samples would violate the defendant's rights to due process under both the United States and Arizona Constitutions and would violate *Brady v. Maryland*, 373 U.S. 83 (1963).

II. Law and Argument

A. Testing the swabs will not violate *Brady v. Maryland* or its progeny or otherwise violate the defendant's rights to due process, even though the testing will consume all the material on the swabs.

The defendant first argues that allowing the State to consume the samples in testing would violate his right to due process, specifically, his due process right to be provided with all exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). The defendant cites *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993), and *California v. Trombetta*, 467 U.S. 479 (1984). From these cases, he concedes that to show a *Brady* violation, he must meet the burden of showing both that the exculpatory value of any evidence that is destroyed was apparent before its destruction, and that the evidence was of such a nature that the defendant could not obtain comparable evidence by other reasonably available means. However, he asserts that he can satisfy both prongs of that test. First, he says, since identification of the assailant is at issue, DNA testing of the samples is of paramount importance because it "may potentially exonerate" him. Second, he correctly states that once the samples are gone, there will be no substitutes.

The first problem with the defendant's analysis is that it fails to recognize that there is a difference between evidence whose exculpatory value is apparent and evidence that is only **potentially** exculpatory. The defendant here states that the sample is only potentially exculpatory. However, the two-part test that the defendant cites is only applicable to evidence whose exculpatory value is readily apparent. Both

Trombetta, *supra*, and *Arizona v. Youngblood*, 488 U.S. 51 (1988) impose a different requirement on a defendant who is claiming that the State has failed to preserve **potentially** exculpatory evidence. Those cases hold that, to prevail on such a claim, the defendant must show that the government acted in **bad faith** when the government either destroyed or failed to preserve potentially exculpatory evidence. *Trombetta* dealt with failure to preserve breath samples in DUI cases. The *Trombetta* Court noted that the officers had failed to preserve breath samples, but that they did not do so "in a calculated effort to circumvent the disclosure requirement established by *Brady v. Maryland* and its progeny;" instead, the officers were acting in good faith in accordance with their normal practice. *Trombetta v. California*, 467 U.S. 479, 487 (1984).

Arizona v. Youngblood, 488 U.S. 51 (1988), made the "bad faith" requirement more explicit. In *Youngblood*, the defendant argued that the police had violated his rights under *Brady* and *Trombetta* because the State had failed to preserve potentially exculpatory biological evidence. The Supreme Court disagreed, stating that police need not retain and preserve "all material that might be of conceivable evidentiary significance in a particular prosecution." The Court said:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Thus, for a defendant to show that failure to preserve **potentially** exculpatory evidence violates his due process rights,

Youngblood requires the defendant to show that the State's agents acted in bad faith by failing to preserve such evidence.

Thus, since the evidence here is at best potentially exculpatory, the defendant bears the burden of showing that testing and consuming the sample would be done in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). The defendant has not met that burden. The defendant cites no authority to support the proposition that testing the samples would show bad faith on the part of the State, and the State has been unable to find any such authority despite an extensive search. Rather, the authorities support the State's position.

For example, in *State v. Dechaine*, 572 A.2d 130 (Maine 1990), the State tested blood samples taken from under the murder victim's fingernails, consuming virtually all of the samples in the process, and determined that they were the victim's own blood type. The defendant argued that he was denied due process because so little material remained after the State's tests were completed that he was unable to perform other tests that might have implicated someone else. The Maine Supreme Court found no error, stating, "[W]e do not find that the State's own testing, designed to determine blood type, that consumed most of the available sample, amounted to a failure to preserve evidence that resulted in the deprivation of due process." Quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), the Maine Court said:

> The State's legitimate use of "evidentiary material of which no more can be said than that it could have been subjected to [other] tests, the results of which might have exonerated the defendant," does not constitute a denial of due process of law.

State v. Dechaine, 572 A.2d 130, 133 (Maine 1990) [*Youngblood* paraphrase by the Maine Court].

Similarly, in *State v. Ferguson*, 20 S.W.3d 485 (Mo. 2000), the defendant argued that DNA evidence should not be admitted because the semen sample was consumed in the testing process and he was not able to have independent tests performed. Citing *Youngblood*, the Missouri Supreme Court said:

> In cases where the testing agency finds it necessary to consume the only sample of evidence in the testing procedure, admission of the test results does not violate due process in the absence of bad faith on the part of the state.

State v. Ferguson, 20 S.W.3d 485, 496 (Mo. 2000). The Missouri Court found that because the defendant did not allege that State acted in bad faith in performing the testing that consumed the sample, there was no error and the DNA evidence was admissible. *Accord*, *People v. Lulenski*, 193 A.D.2d 817, 598 N.Y.S. 289 (N.Y.A.D. 1993); *State v. Peterson*, 242 Neb. 286, 494 N.W.2d 551 (1993); *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991).

In addition, courts have recognized that there is no requirement that the authorities perform every conceivable test, especially when the amount of material obtained is small. In *State v. Bakalov*, 979 P.2d 799 (Utah 1999), the authorities obtained only one sample from the victim's "Code R" rape kit, and that sample was too small to divide. A test on that small sample found sperm, but the chemicals used in that test made it impossible to test the sample further to determine DNA or blood type. The defendant raised a *Brady* claim and also argued that his due process rights were violated, asserting that depriving him of an opportunity to test the sample "deprived him of the basic tools he needed to adequately present his case." *Id*. at 815, ¶ 48. The Utah Supreme Court disagreed, noting that *Trombetta* says that the untested or unavailable evidence must have "apparent" exculpatory value before *Brady* requires disclosure, and

there was no such apparent exculpatory value in the sample. *Id*. at ¶ 49. The Utah Court rejected the due process argument as well:

> [W]hile due process may demand that the State reasonably maintain evidence potentially favorable to a defendant, it does not require that the State search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case. To make such a demand on the prosecution, indeed, would be to require the impossible. Evidence such as the Code R sample in this case is fragile, is subject to decay, and may tolerate only limited analysis. Performing one sort of test important to the prosecution may preclude conducting other tests. Also, evidence becomes relevant in a particular case only after the legal theories in the case have been identified. Due process does not extend to forcing the prosecutor to divine a defendant's legal theories or to forego conducting evidentiary analyses favorable to the State's case.

State v. Bakalov, 979 P.2d 799, 815-816, ¶ 50 (Utah 1999) [citations and internal quotation marks omitted]. The Court further noted that biological evidence, especially when obtained in small quantities, is highly volatile, and limited chemical testing can consume an entire sample, rendering it useless to further analysis. Citing the "bad faith" requirement of *Youngblood*, *supra*, the Court said, "The strictures of due process accommodate this reality." *Bakalov*, *id*. at ¶ 53. The test results are admissible even though the sample size is so small that testing is limited. As the North Carolina Supreme Court has stated, "The inability to perform additional testing on the blood samples goes to the weight of the evidence, not its admissibility." *State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223 (1993).

It is insufficient for a defendant to speculate that the sample might have been subjected to further testing. The defendant must make some showing that an additional test or tests could have been performed on the sample. In *State v. Asherman*, 193 Conn. 695, 478 A.2d 227 (1984), a murder case, police found a single human hair embedded in a minute amount of blood on the defendant's key ring. Testing showed

that the blood was human blood and that the hair matched the victim's DNA profile, but that testing completely consumed the evidence. The defendant argued that the evidence should have been excluded because, if he had had an opportunity to test the samples independently, he might have been able to establish that the blood and hair came from someone other than the victim. The Connecticut Supreme Court disagreed, stating:

> The difficulty with the defendant's claim is that it is unsupported. The defendant offered no evidence nor made any offer of proof that the amounts of blood on the key ring and the hair were sufficient, if properly tested, to establish blood type. In the absence of such evidence or offer the defendant's claim was speculative. Furthermore, the defendant does not challenge the state's assertion that the testing of the samples necessarily consumed each sample. In the circumstances we cannot conclude that the defendant has been denied a fair trial.

State v. Asherman, 193 Con. 695, 725, 478 A.2d 227, 246-47 (1984). Similarly, in *Smith v. State*, 270 Ga. 68, 508 S.E.2d 145 (1998), the State performed DNA testing on a small amount of material found under one of the murder victim's fingernails, completely consuming the material in the testing process. The defendant argued that the evidence should be excluded because he was denied his due process right to an independent test. The Georgia Supreme Court disagreed, stating, "Where there is only enough material to perform one test, an independent test is impossible and, thus, admission of the test results does not violate the defendant's due process rights." *Id*. at 71, 508 S.E.2d at 148. In this case, the defendant's unsupported speculation that further testing could be done, despite the minimal quantity of material involved, is insufficient to meet the defendant's burden. Therefore, this Court should allow the State to perform the testing and admit the test results at trial.

B. The defendant is not entitled to have a representative present when DPS performs the test. The defendant is only entitled to full documentation of the test procedures and results.

The defendant next argues that, if this Court allows the State to test the evidence, he should be entitled to have his own expert present when DPS performs the test. The State opposes this because of the nature of the testing procedures. DNA testing is highly technical and requires stringent controls to prevent contamination. To address these concerns, every time a defense expert wanted to be present during DNA testing, the DPS lab would essentially have to close down all its operations except for that one defendant's testing. Allowing a parade of experts into the DPS lab would effectively slow the testing process to a halt, vastly increasing both the expense and the time required to perform testing.

It is not necessary for the defendant's expert to be physically present during the testing, so long as the State provides the defense with full documentation of the test procedures and results and allows the defense a full and fair opportunity to cross-examine the State's experts and challenge the test results. In *State v. Thomas*, 187 W.Va. 686, 421 S.E.2d 227 (W.Va. 1992), the State's electrophoresis testing implicated the defendant, but the State failed to preserve photographs of the electrophoresis slides, so that the defense experts were unable to confirm their accuracy. The West Virginia Supreme Court of Appeals held that the test results should be suppressed because the State had failed to give the defendant sufficient documentation to allow the defense to raise a meaningful challenge to the test results. The Court stated:

> In an ideal world, the State would be able to preserve enough of the sample that a completely independent test could be performed. However, we recognize that given the necessities of certain tests and the small quantities of available material, preservation of enough of the sample for an independent test may not be possible. That is why we accept the

> general proposition that the State does not commit a violation when it, in good faith, uses up the entire sample in performing a necessary scientific test. With that "right" comes a responsibility: the State must put the defendant in as nearly identical a position as he would have been in had he been able to perform an independent test.

State v. Thomas, 187 W.Va. 686, 693-694, 421 S.E.2d 227, 234-235 (W.Va. 1992) [footnote omitted]. In *State v. Jarvis*, 199 W.Va. 38, 48, 483 S.E.2d 38, 48 (1996), the West Virginia Court, citing *Thomas*, found no error because the State provided the defense with sufficient documentation of the test procedures and results so that the defendant and his experts could conduct a full and fair examination. *See also State v. Peterson*, 242 Neb. 286, 292, 494 N.W.2d 551, 556-57 (1993) [When blood samples were consumed in testing, no error in allowing State's expert to testify, "provided that the scientific or technical basis of the expert's opinion and the specific facts of the case on which the expert's opinion is based are before the jury and that the opposing party has the opportunity to cross-examine the expert as to these foundational matters"]. *But see State v. Riley*, 69 Ohio App.3d 509, 591 N.E.2d 263 (1990) [Ohio statute specifically guaranteed a drug defendant a right to a portion of the substance for independent analysis or, if not, to have a private analyst present during the State's analysis].

III. Conclusion

The defendant does not contest the fact that the State has obtained biological samples nor that testing them for evidentiary value will consume them. Nevertheless, the defendant argues that the State should not be allowed to consume the samples in testing because the samples might potentially be exculpatory. Effectively, the defense would prevent the State from testing the samples at all. This would put the State into an impossible dilemma because, if the State did **not** test the samples, the defendant would

argue that he was denied due process by the **failure** to test, because a test might have exonerated him. The only alternative would be to turn the evidence over to the defendant for testing, and it is "inconceivable" that the State or this Court would permit the defendant to "have sole access to this physical evidence." *See Commonwealth v. Conkey*, 16 Mass.L.Rptr. 691, n. 3 (2003 WL 22120176) (Mass. Superior Court, August 26, 2003).

Therefore, for all the reasons stated in this Response, the State asks this Court to allow the State to have the DPS lab test the samples and then provide the defense with full documentation of the test procedures and results.